

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF THE LOUISVILLE AND)	
JEFFERSON COUNTY METROPOLITAN)	
SEWER DISTRICT FOR AN ORDER)	CASE NO. 2009-00494
APPROVING A TRANSFER OF OWNERSHIP)	
AND CONTROL)	

ORDER

Louisville and Jefferson County Metropolitan Sewer District ("MSD") has applied for approval of its acquisition of sewage treatment and collection facilities from Shadowwood Waste Environmental, LLC ("Shadowwood").

Having reviewed the application and being otherwise sufficiently advised,¹ the Commission finds that:

¹ In Case No. 2009-00336, *Application of the Louisville and Jefferson County Metropolitan Sewer District for an Order Approving a Transfer of Ownership and Control* (Ky. PSC Nov. 25, 2009), MSD applied for Commission approval of its acquisition of the facilities in question but withdrew its application with the intent of filing a new application containing additional material regarding its acquisition of the facilities and its efforts to improve the facilities.

On December 11, 2009, MSD tendered its revised application to the Commission. Finding that application was not verified by oath or affirmation and thus failed to comply with KRS 278.020(6), the Executive Director rejected the application. On December 30, 2009, MSD supplemented its application with the required verification statement. On January 5, 2010, the Executive Director advised MSD that the supplemented application met filing requirements and was deemed filed as of December 30, 2009.

No person has sought intervention in this proceeding. MSD has not requested a hearing in this matter. The record is complete. The case stands ready for decision.

1. Shadowwood is a Kentucky limited liability company² that is organized pursuant to KRS Chapter 275.

2. Shadowwood owns and operates subdivision sewage collection and treatment facilities that serve approximately 207 customers in the northeastern portion of Jefferson County, Kentucky.³

3. Shadowwood's treatment and collection facilities consist of an extended aeration treatment plant with a maximum daily treatment capacity of 85,000 gallons; two pumping stations; 1,800 linear feet of 10-inch clay collection main; 2,150 linear feet of 8-inch clay collection main; 1,600 linear feet of 8-inch polyvinylchloride ("PVC") collection main; and 3,065 linear feet of 4-inch PVC collection main.⁴ The treatment plant was constructed in 1966.

4. As of December 31, 2007, Shadowwood had total net utility plant of \$280,713.⁵

5. As of December 31, 2007, Shadowwood had total assets and debits of \$334,031.

² See <http://apps.sos.ky.gov/business/obdb/%28S%28fdqgk145ozualv45b4wup055%29%29/showentity.aspx?id=0588938&ct=06&cs=99999> (last visited Feb. 24, 2010).

³ Annual Report of Shadowwood Waste Environmental, LLC to the Public Service Commission for the Year Ended December 31, 2007 at 12. In its report for the year ending December 31, 2008, Shadowwood did not report its number of customers.

⁴ Annual Report of Shadow Wood Subdivision Sewer Service to the Public Service Commission for the Year Ended December 31, 2002 at 12. Later annual reports to the Commission for the sewage collection and treatment facilities failed to report any information regarding the plant.

⁵ Annual Report of Shadowwood Waste Environmental, LLC to the Public Service Commission for the Year Ended December 31, 2007 at 2.

6. As of December 31, 2007, Shadowwood had total liabilities and credits of \$334,031, which consisted of accounts payable of \$11,343, equity capital of \$87,946, and contributions in aid of construction of \$234,741.⁶

7. MSD is a metropolitan sewer district created pursuant to KRS Chapter 76.

8. MSD provides sanitary sewer and drainage services to approximately 226,430 customers in Jefferson County, Kentucky.⁷

9. MSD operates six large wastewater treatment facilities and 15 small wastewater treatment plants, which are similar in size and design to Shadowwood's sewage treatment plant. The combined daily treatment capacity of MSD's treatment facilities is 173.5 million gallons.⁸

10. As of June 30, 2008, MSD employed over 625 persons.⁹ Approximately 73 of these employees are certified wastewater treatment operators.¹⁰

11. As of June 30, 2008, MSD had net plant of \$1.803 billion.¹¹

12. As of June 30, 2008, MSD had total assets of \$2.007 billion, total liabilities of \$1.457 billion, and total net assets of \$555.519 million.¹²

⁶ *Id.*

⁷ Louisville and Jefferson County Metropolitan Sewer District, *Comprehensive Annual Financial Report for the Fiscal Year Ended June 30, 2008* at 56.

⁸ *Id.*

⁹ *Id.* at 17.

¹⁰ Application at 6.

¹¹ *Comprehensive Annual Report* at 55.

¹² *Id.* at 19.

13. For the year ending June 30, 2008, MSD had total operating revenues of \$161,283,000 and total operating expenses of \$125,820,000.¹³

14. MSD has been in existence since 1946.

15. MSD is governed by a board that consists of eight members who are appointed by the Mayor of the Louisville Metro Government, subject to the approval of the Louisville Metro Council.¹⁴

16. The approval of the Louisville Metro Council is required before MSD may implement a change in its rates for service.¹⁵

17. On February 28, 2005, Shadowwood and MSD entered into an Agreement that provided:

a. On March 1, 2005, MSD would assume operational and maintenance responsibilities for Shadowwood's sewage treatment and collection system and responsibility for all costs associated with the system's operation and maintenance.

b. Shadowwood would retain ownership of the system and would be responsible for billing and collections.

c. Shadowwood would tender monthly to MSD an amount equal to all billings received for the month minus its authorized retainage amount.

d. Shadowwood could retain from its billings on a bi-monthly basis an amount no greater than \$1,000. Shadowwood's annual retainage amount was \$6,000.

¹³ *Id.* at 51.

¹⁴ *Id.* at 23. See also KRS 76.030.

¹⁵ *Comprehensive Annual Financial Report* at 24; KRS 76.080(10).

e. When MSD determined that its collection and treatment system was available, it was authorized to take all necessary actions to divert the flow from Shadowwood's system into its own collection and treatment system.

f. On and after March 1, 2006 and upon 90 days' notice to MSD, Shadowwood could terminate the Agreement with MSD. Upon receipt of such notice, MSD had the right to purchase Shadowwood's system for \$45,000. MSD must exercise this right within 30 days of notice of termination.

g. Prior to the diversion of flows from Shadowwood's system to MSD's collection and treatment system, customers of the Shadowwood system would be charged a rate established by the Commission. Upon this diversion of flows, these customers would be assessed a rate in accordance with MSD's regular schedule of rates, rentals and charges.

18. Between March 1, 2005 and September 17, 2008, MSD operated Shadowwood's system pursuant to the terms of the Agreement of February 28, 2005.

19. On September 17, 2008, Shadowwood executed a bill of sale and deed in which it purported to convey to MSD for \$45,000 all of its interests in Shadowwood's sewage treatment and collection facilities and the real property on which these facilities were located.

20. On October 1, 2008, MSD submitted a "Change in Ownership Certification" to the Kentucky Division of Water and certified that it had assumed ownership of the Shadowwood Wastewater Treatment Plant and responsibility for

meeting the conditions of that facility's Kentucky Pollutant Discharge Elimination System Permit.¹⁶

21. Neither MSD nor Shadowwood notified the Commission of the transaction or otherwise sought Commission approval of the transaction until Commission Staff made an inquiry to MSD representatives on November 6, 2008.¹⁷

22. In response to Commission Staff inquiries, MSD advised the Commission on December 3, 2008 that the transaction did not require Commission approval.¹⁸

23. On March 30, 2009, Commission Staff advised MSD that MSD's position was contrary to KRS 278.020 and conflicted with MSD's past conduct when acquiring sewage treatment facilities that were subject to Commission jurisdiction.¹⁹

24. MSD subsequently requested information regarding Commission procedures to which Commission Staff responded.

¹⁶ Application, Exhibit C.

¹⁷ Application at 3 – 4.

¹⁸ Letter from Douglas Scott Porter, MSD Environmental Counsel, to Gerald Wuetcher, Assistant General Counsel, Public Service Commission (Dec. 3, 2008).

¹⁹ Letter from Gerald Wuetcher, Executive Advisor, Public Service Commission, to Douglas Scott Porter, MSD Environmental Counsel (Mar. 30, 2009). See also Case No. 1992-00246, *Application of the Louisville and Jefferson County Metropolitan Sewer District for Approval to Acquire The Assets of Valley Treatment Plant, Inc.* (Ky. PSC July 1, 1992); Case No. 1991-00130, *Application of the Louisville and Jefferson County Metropolitan Sewer District for Approval to Acquire The Assets of JAMPAC Corporation* (Ky. PSC Apr. 30, 1991); Case No. 1991-00109, *Application of the Louisville and Jefferson County Metropolitan Sewer District for Approval to Acquire The Assets of Sunshine/Sungold Wastewater Treatment Plant* (Ky. PSC Apr. 11, 1991); Case No. 1990-00399, *Application of the Louisville and Jefferson County Metropolitan Sewer District for Approval to Acquire The Assets of Pinetree Sanitation, Inc.* (Ky. PSC Dec. 21, 1990).

25. On August 12, 2009, MSD tendered its first application for Commission approval of MSD's acquisition of Shadowwood's facilities.

26. Upon completion of its transaction with Shadowwood, MSD began billing persons receiving sewer service from the Shadowwood facilities based upon the rates and charges set forth in MSD's rate schedules. These rates and charges were greater than those set forth in Shadowwood's filed rate schedules.

27. As a result of its use of MSD rates, the amount that MSD billed to Shadowwood customers between September 17, 2008 and October 31, 2009 for sewer service was approximately \$9,699 greater than the amount required using Shadowwood's filed rate schedules.²⁰

28. Since September 17, 2008, MSD has expended approximately \$16,746.77 on improvements to Shadowwood treatment and collection facilities.²¹

29. MSD estimates that, upon extension of its collection and treatment system to the area that Shadowwood's system presently serves and the diversion of the flow from Shadowwood's system into that collection and treatment system, MSD will expend \$290,000 to decommission the Shadowwood sewage treatment facility.²²

Based upon these findings, the Commission makes the following conclusions of law:

1. Shadowwood is a utility that is subject to Commission jurisdiction.²³

²⁰ Application at 10 and Exhibit L.

²¹ *Id.* at 10.

²² *Id.* at 11.

²³ KRS 278.010(3)(f).

2. MSD is not a utility and is therefore not subject to Commission regulation.²⁴

3. As a metropolitan sewer district organized pursuant to KRS Chapter 76, MSD is a municipal corporation.²⁵

4. MSD is a “corporation”²⁶ and a “person”²⁷ for purposes of KRS Chapter 278.

5. KRS 278.020(5) provides that “[n]o person shall acquire or transfer ownership of, or control, or the right to control, any utility under the jurisdiction of the commission . . . without prior approval by the commission.” As MSD is a person and is acquiring ownership of Shadowwood’s sewage treatment facilities, this statute is applicable to and requires prior Commission approval of MSD’s acquisition.

6. KRS 278.020(6) provides that “[n]o individual, group, syndicate, general or limited partnership, association, corporation, joint stock company, trust, or other entity (an ‘acquirer’), whether or not organized under the laws of this state, shall acquire

²⁴ See KRS 278.010(3)(f) (expressly excluding from definition of “utility” any person who owns facilities that are subject to regulation by a metropolitan sewer district).

²⁵ See *Rash v. Louisville & Jefferson County Metropolitan Sewer District*, 309 Ky. 442, 217 S.W.2d 232 (1948). See also *Louisville-Jefferson County Metro Ethics Com’n v. Schardein*, 259 S.W.2d 510, 513 (“the MSD is ‘a public body corporate, and political subdivision’”); *Fawbush v. Louisville-Jefferson County Metropolitan Sewer District*, 240 S.W.622, 623 (Ky. 1951) (holding that MSD “is an independent public corporation”).

²⁶ See KRS 278.010(1) (providing that a corporation “includes private, quasipublic, and public corporations, and all boards, agencies, and instrumentalities thereof, associations, joint-stock companies, and business trusts”).

²⁷ See KRS 278.010(2) (providing that a person includes “includes natural persons, partnerships, corporations, and two (2) or more persons having a joint or common interest”).

control, either directly or indirectly, of any utility furnishing utility service in this state, without having first obtained the approval of the commission.” As MSD is a corporation and is acquiring control of Shadowwood’s utility operations through the acquisition of Shadowwood’s sewage treatment and collection facilities, this statute is applicable to and requires prior Commission approval of the transfer of those facilities.

7. KRS 278.020(6) further provides that “[a]ny acquisition of control without prior authorization [of the Commission] shall be void and of no effect.”

8. While all parties to a transaction transferring ownership or control of a utility are not required to be signatories to an application to the Commission for authorization for such transaction or parties to a Commission proceeding considering such application,²⁸ the transferor and transferee are jointly responsible for ensuring Commission approval of the transfer before effecting such transfer.

9. The bill of sale and deed that Shadowwood executed on September 17, 2008 could not convey ownership and control of Shadowwood’s facilities to MSD until the Commission had authorized such transfer.

10. From September 17, 2008 until the date of this Order, MSD lacked any ownership interest in Shadowwood’s facilities and operated those facilities on behalf of Shadowwood.

11. KRS 278.160(2) provides: “No utility shall charge, demand, collect, or receive from any person a greater or less compensation for any service rendered or to be rendered than that prescribed in its filed schedules, and no person shall receive any

²⁸ See Case No. 2002-00018, *Application for Approval of the Transfer of Control of Kentucky-American Water Company to RWE Aktiengesellschaft and Thames Water Aqua Holdings GmbH* (Ky. PSC May 30, 2002) at 11

service from any utility for a compensation greater or less than that prescribed in such schedules.”

12. From September 17, 2008 until the date of this Order, the lawful rate for sewage treatment and collection services provided to Shadowwood customers was the rate set forth in Shadowwood’s filed rate schedules.

13. From September 17, 2008 until the date of this Order, Shadowwood customers have been assessed a rate for sewer treatment and collection services in excess of the lawful rate.

14. In view of its financial assets and its status as a political subdivision of the Commonwealth, MSD has sufficient financial integrity to ensure the continuity of utility service.

15. MSD has the financial, technical, and managerial abilities to provide reasonable service to Shadowwood’s present customers.

16. MSD’s acquisition of Shadowwood’s sewage treatment and collection facilities is in accordance with law and for a proper purpose.

17. KRS 278.020(6) authorizes the Commission to approve the acquisition of control of a utility “upon terms and conditions as it deems necessary or appropriate.”

18. The transfer of ownership and control of Shadowwood’s sewage treatment and collection facilities to MSD will be consistent with the public interest only upon the condition that:

a. Within 60 days of the date of this Order, MSD will refund by separate payment or billing credit all amounts collected from Shadowwood’s customers

in excess of the rate set forth in Shadowwood's rate schedule on file with the Commission from September 17, 2008 to the date of this Order.

b. Within 10 days after the completion of all directed refunds, MSD will file with the Commission a written report stating the amount of revenue actually collected from Shadowwood customers in each month from September 17, 2008 to the date of this Order; the amount of revenue that should have been collected each month under the Shadowwood rate; and the amount of revenue refunded to Shadowwood customers.

c. Within 7 days of the date of this Order, MSD will file with the Commission a written notice, executed by its chief executive officer, of its acceptance of and agreement to be bound by the conditions set forth above.

IT IS THEREFORE ORDERED that:

1. MSD's acquisition of Shadowwood's sewage treatment and collection facilities is approved upon the following conditions:

a. Within 60 days of the date of this Order, MSD shall refund by separate payment or billing credit all amounts collected from Shadowwood's customers in excess of the rate set forth in Shadowwood's rate schedule on file with the Commission from September 17, 2008 to the date of this Order.

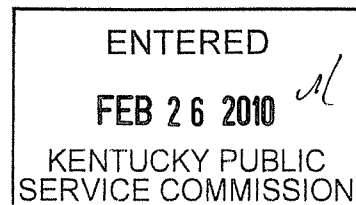
b. Within 10 days after the completion of all directed refunds, MSD shall file with the Commission a written report stating the amount of revenue actually collected from Shadowwood customers in each month from September 17, 2008 to the date of this Order; the amount of revenue that should have been collected each month

under the Shadowwood rate; and the amount of revenue refunded to Shadowwood customers.

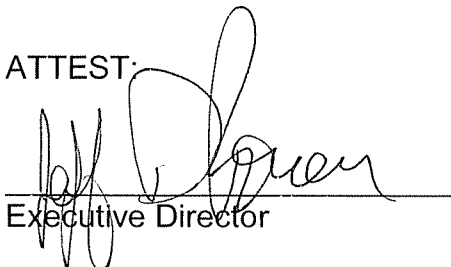
c. Within 7 days of the date of this Order, MSD shall file with the Commission a written notice, executed by its chief executive officer, of its acceptance of and agreement to be bound by the conditions set forth above.

2. Upon MSD's acceptance of the conditions set forth in Ordering Paragraph 1, the transfer of control and ownership of the Shadowwood's sewage treatment and collection facilities to MSD shall be completed and those facilities shall cease to be subject to Commission jurisdiction.

By the Commission



ATTEST:


Executive Director

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